

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

EDWIN DEWAYNE RICHMOND,

Defendant-Appellee.

UNPUBLISHED

April 22, 2008

No. 277012

Wayne Circuit Court

LC No. 06-013878-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ROBERT FITZGERALD BROWN,

Defendant-Appellee.

No. 277015

Wayne Circuit Court

LC No. 06-013878-02

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Defendants were charged with manufacturing between 5 and 45 kilograms of marijuana, MCL 333.7401(2)(d)(ii), and defendant Richmond was also charged with possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony, MCL 750.227b. The circuit court dismissed the charges after suppressing the evidence seized during the execution of a search warrant at defendant Richmond's residence. The prosecution appeals as of right. We reverse and remand. We decide these appeals without oral argument under MCR 7.214(E).

I. FACTS

In May of 2006, the Livonia Police Department received an anonymous tip that a black male who owned a newer-model Ford F-150 and Michigan license plate OBE 11 was cultivating marijuana at his home. The informant also believed that the man lived at 22439 Santa Maria in the city of Detroit. Police checked home and driver license records and found that an Edwin Dewayne Richmond did in fact own the F-150 and lived at the address specified. Trying to

corroborate the marijuana claims, the police seized trash left on the curb in front of the Santa Maria home and found one stem of suspected marijuana, which later tested positive for THC. Based on this information, a search warrant was issued on May 22, 2006, for evidence of cultivation and manufacture of controlled substances at the Santa Maria address. The Livonia Police Department executed this warrant and found both defendants in an outbuilding behind the Santa Maria home. Among the items seized in the home and the outbuilding were two firearms, guides on how to grow marijuana, and numerous marijuana plants. Defendants filed a motion to quash the information on February 2, 2007; the trial court found the search warrant invalid, suppressed the evidence, and dismissed the charges against both defendants. Plaintiff now appeals.

II. VALIDITY OF SEARCH WARRANT

The trial court found that the search warrant was invalid because the supporting affidavit failed to establish probable cause to issue the warrant and that the good-faith exception to the exclusionary rule did not apply. We disagree.

A. Standard of Review

In *People v Martin*, 271 Mich App 280, 297; 721 NW2d 815 (2006), this Court summarized the applicable standard of review as follows:

“[A]ppellate scrutiny of a magistrate’s decision involves neither de novo review nor application of an abuse of discretion standard.” *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992). Instead, this Court need only ask “whether a reasonably cautious person could have concluded that there was a ‘substantial basis’ for the finding of probable cause.” *Id.* Because of the strong preference for searches conducted pursuant to a search warrant, a magistrate’s decision regarding probable cause should be paid great deference. *Id.* at 604, citing *Illinois v Gates*, 462 US 213, 236-237; 103 S Ct 2317; 76 L Ed 2d 527 (1983). “Affording deference to the magistrate’s decision simply requires that reviewing courts ensure that there is a substantial basis for the magistrate’s conclusion that there is a ‘fair probability that contraband or evidence of a crime will be found in a particular place.’” *Russo, supra* at 604, quoting *Gates, supra* at 238. Finally, this Court reviews a trial court’s factual findings in a ruling on a motion to suppress for clear error, *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005), but reviews de novo a trial court’s interpretation of the law or the application of a constitutional standard to uncontested facts, *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

B. Analysis

In this case, the affidavit in support of the search warrant stated that the affiant “received information from an individual who wished to remain anonymous, that a black male driving a newer black Ford F-150 bearing license plate OBE 11 may be involved in the cultivation of marijuana. The anonymous caller further stated that he/she believes the black male lives at 22439 Santa Maria in Detroit MI.” The affiant determined from the Secretary of State computer

system that a 2004 F-150 with the specified license plate was registered to defendant Richmond at the specified address. According to the affidavit, Lt. McDermott and Sgt. McKeon confiscated a bag of trash from in front of defendant Richmond's home and located a marijuana stem and mail addressed to Richmond. The affidavit also included several paragraphs concerning common practices of drug traffickers and the cultivation of marijuana in general.

Although the trial court relied on this Court's decision in *People v Keller*, 270 Mich App 446, 448; 716 NW2d 311 (2006), to conclude that the information in the affidavit was insufficient to establish probable cause to issue a warrant, that decision was subsequently reversed by our Supreme Court. *People v Keller*, 479 Mich 467; 739 NW2d 505 (2007).

Consistent with our Supreme Court's decision in *Keller*, we conclude that the discovery of the marijuana stem in the trash taken from defendant Richmond's home provided a substantial basis for concluding that there was probable cause to search Richmond's home for additional contraband. *Id.* at 477. However, the discovery of the single stem of marijuana did not provide a substantial basis for concluding that probable cause to search for evidence of cultivation existed. To determine whether the invalid portion of the warrant may be severed, we must apply the multi-step analysis adopted by our Supreme Court in *Keller*. *Id.* at 478-481. We conclude that the cultivation category of evidence is distinguishable from the valid categories of evidence of marijuana and possession evidence. The authorized search for marijuana permitted the police to search the premises and curtilage. We conclude that the valid portion formed the greater portion of the warrant. *Id.* at 479-480. Therefore, just as the distribution category of evidence was severable in *Keller*, the cultivation category of evidence is severable here. The infirmity of the portion of the warrant concerning cultivation does not require suppression of anything described in the valid portion of the warrant, or which was lawfully seized during the execution of the valid portion, including, for example, items seized on plain view grounds. *Id.* at 478. Defendants do not dispute the prosecution's assertion that the evidence of cultivation was in plain view once the police looked in places where marijuana might reasonably be found, and the preliminary examination testimony supports the prosecution's contention. Accordingly, because the discovery of the marijuana stem provided probable cause to search for additional contraband, the evidence of cultivation was severable, and defendants do not contest that the cultivation evidence was in plain view during the execution of the warrant, we reverse the trial court's suppression order.

III. PROBABLE CAUSE FOR BINDOVER OF DEFENDANT BROWN

Defendant Brown additionally argues that there was no probable cause for the district court to bind him over on the charge of manufacturing marijuana because there was no evidence that he aided and abetted defendant Richmond.¹ Again, we disagree.

¹ Brown is essentially arguing an alternative ground for affirmance of the dismissal order. As such, he may argue this issue without filing a cross appeal. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994).

A. Standard of Review

This Court reviews for an abuse of discretion a district court's decision to bind over a defendant. *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000).

A district court must bind over where the prosecutor has presented competent evidence sufficient to support probable cause to find both that a felony was committed and that defendant committed it. The prosecutor is not required to prove all elements of the offense charged at the preliminary hearing, but must only produce evidence sufficient for a finding of probable cause. Probable cause to believe that the defendant committed the crime is established by a reasonable ground of suspicion, supported by circumstances sufficiently strong to warrant a cautious person in the belief that the accused is guilty of the offense charged. Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to justify binding over a defendant. [*People v Cervi*, 270 Mich App 603, 615-616; 717 NW2d 356 (2006) (citations and internal quotation marks omitted).]

B. Analysis

According to the testimony at the preliminary examination, when the police forcibly entered the outbuilding at defendant Richmond's home, defendants Brown and Richmond were both inside. The cultivation operation was apparent when the door was opened. In a statement to the police, defendant Brown admitted that he was aware of the marijuana growing operation six months before the raid. Although he denied being involved, he admitted that he was there that evening to help defendant Richmond install or lift an air conditioning unit into the grow room, and he was aware that marijuana was being grown.

A person who aids or abets in the commission of an offense may be convicted and punished as if he directly committed the offense. MCL 767.39; *People v Robinson*, 475 Mich 1, 5-6; 715 NW2d 44 (2006). To support a finding that a defendant aided and abetted a crime, the prosecutor must show that: ““(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement.”” *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004) (citation omitted). The evidence that defendant Brown assisted defendant Richmond with temperature control of the outbuilding where the marijuana was being cultivated, with knowledge that marijuana was being grown inside, provided probable cause that defendant Brown aided and abetted defendant Richmond in the manufacture of the marijuana. Thus, the magistrate's ruling was not an abuse of discretion.

Reversed and remanded for reinstatement of the charges against defendants. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Donald S. Owens
/s/ Bill Schuette